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NO. 976

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

NORTHERN PACIFIC RAILWAY COMPANY, and WALKER D. HINES, as Director General of Railroads,
*Plaintiffs in Error.*

*vs.*

STATE OF NORTH DAKOTA, ex rel., WILLIAM LANGER, Attorney General,
*Defendant in Error.*

Writ of Error to the Supreme Court of North Dakota.

## BRIEF AMICI CURIAE OF THE SEVERAL STATES AND THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS.

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## BRIEF AMICI CURIAE OF THE SEVERAL STATES AND THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS.

## STATEMENT.

This brief is presented in behalf of thirty-seven states of the Union, represented by their respective public service commissions, and by the National Association of Railway and Utilities Commissioners. Every state in the Union, except Delaware, has created public service commissions which are charged with the duty of regulating railroad companies. Their duties vary according to the laws in each state, but, generally speaking, they are vested with jurisdiction over questions of service, practices, account-

ing, and also the reasonableness of rates, fares and charges to be applied to intrastate commerce.

The issue in the pending North Dakota case presents the question of the right of the states of the Union, in the proper exercise of the police power, to regulate intrastate rates, fares and charges of common carriers, during the period of federal control. This vitally concerns the convenience and welfare of the people within these states.

## ARGUMENT.

The power to regulate intrastate railroad rates, without complying with the state laws in relation thereto, is claimed to be based, not upon the war power of the President, but upon the war power of Congress as exercised in the Act of August 29, 1916, and the Act of March 21, 1918.

It is claimed by plaintiffs in error that the former act which authorized the President, in time of war,

> "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable"

contained a sufficiently broad grant of power to authorize the President to take the action in question. We will first consider that question.

### The Act of August 29, 1916, Conferred No Power Over Intrastate Rates.

What was the occasion of the attachment of the above mentioned provision to the army appropriation bill? The country was not then engaged in war. Our relations with Mexico, however, were strained. We believe it is fair to assume that the act in question was passed with the intention of vesting the President with the authority necessary

to deal successfully with the Mexican situation. If that is so, Congress might well have considered that the President should have the power to take possession of certain lines leading to the Mexican border, and even to exclude some of the ordinary traffic therefrom, in order to secure the prompt and safe transportation of troops and supplies. It is hardly possible that Congress could then have intended to confer on the President authority to regulate all rates, intrastate as well as interstate, in entire disregard of the existing laws governing such regulation.

The necessities of the occasion did not require such action, and if such a proposition had been put before the Congress it would have been met with active opposition and been the occasion of extended debate, as was the case when the right to initiate interstate rates was expressly conferred on the President in the Federal Control Act.

Congress clearly did not intend to confer upon the President by the Act of August 29, 1916, an unlimited right of control over railroads. If such had been its purpose it would not have added the words

> "and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

By the addition of those words Congress plainly indicated the nature of, and the limitations upon, the authority granted. Such authority was, in sub-

stance, to assume control of systems of transportation only so far as might be necessary to secure the prompt transportation and delivery of war material and government supplies, even to the extent of excluding other traffic where that should be necessary.

Furthermore, the wording of the act restricts the purposes of federal control to those which are connected with the emergency. While it is true that the war is not technically ended until the peace treaty is signed and ratified, it is equally true that hostilities have ceased, that all war activities in this nation have been discontinued, and that whatever emergency existed here has disappeared. While the federal possession and control may not be ended, except with the technical ending of the war, the extraordinary powers which the President was authorized by the act to exercise over them, as connected with the emergency, ceased with the emergency.

That the emergency has ceased is shown by the drastic terms of the armistice to which the enemy has submitted, which place it in a position where it will be unable to continue the conflict, as was formally announced by the President in the following language:

> "The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German command to renew it."

It is evident that the President's statement was correct, for since the cessation of hostilities the German government has surrendered such a large portion of its war equipment as to render itself appar-

ently unable to renew the conflict, and has permitted the occupation by the allied powers of a considerable extent of strategic and valuable territory. The articles agreed upon on the 11th day of November amounted to more than a mere armistice. They constituted, in fact, a surrender upon conditions, the details of which were to be agreed upon thereafter. Now the representatives of the German government are gathering at Versailles to receive the final terms of peace.

Therefore, while the right to the possession and control of transportation systems may still exist, the extent to which that control may be exercised, being automatically governed by the necessity for its exercise, has so far disappeared as to furnish no support for the regulation of intrastate rates.

Whatever may have been the intention of Congress in passing the Act of August 29, 1916, it is apparent that the President did not give it the construction now contended for, because no effort was made to increase railroad rates, until after the passage of the Act of March 21, 1918, except certain demurrage charges.

By the passage of the Act of March 21, 1918, the authority conferred upon the President by the Act of August 29, 1916, was so far modified and limited as to make it clear that no possible rate making power which may have been conferred by the first act remained, except as expressly provided in the later act. This is shown by the provisions of Section 9 of the Federal Control Act, which provides:

"That the provisions of the act entitled 'An

> Act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act,"

and by the provisions of Section 15, which will be discussed later.

Furthermore, if, as claimed by the government, the Act of August 27, 1916, conferred upon the President the rate making power, there was no necessity for making specific reference to the authority of the President to make rates in the Federal Control Act. The fact that, in the last named act, Congress thought it necessary to be specific as to such rate making authority shows that Congress did not consider that such power had been conferred by the Act of 1916. Therefore, the President's authority to regulate intrastate rates, if it exists at all, which we do not concede, must be found in the Act of March 21, 1918.

## The Federal Control Act Conferred No Power Over Intrastate Rates.

In this connection we will consider first the provisions of the act relating to the fixing of rates. Section 10 confers upon the President the power to initiate rates by filing them with the Interstate Commerce Commission. The President, as to the carriers under federal control, stands in the position of the executive officers, who have long had the power of initiating interstate rates in the same manner.

The Federal Control Act provides, however, that such rates shall not be suspended by the Commission pending final determination, which is a change from the practice prescribed in the Act to Regulate Commerce.

The Federal Control Act further provides that such rates shall be reasonable and just and that the Commission, shall upon complaint, enter upon a hearing concerning their justness and reasonableness. In determining whether the rates satisfy those standards, the Commission is directed to give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition; and, when the President shall find and certify, that, in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit it is necessary to increase the railway operating revenues, such fact shall also be taken into consideration by the Commission, together with such recommendation as he may make.

After full hearing the Commission is directed to *"make such findings and orders as are authorized by the Act to Regulate Commerce as amended, and said findings and orders shall be enforced as provided in said act."*

No effort seems to have been made to supersede the tariff provisions of the last mentioned act, except to the extent that the director general may

prescribe the duration of notice and that the Commission cannot suspend the rates pending investigation.

Under the Act to Regulate Commerce the Commission has no jurisdiction over intrastate rates, except to the limited extent held in the *Shreveport case* and similar cases. That act does not authorize the Interstate Commerce Commission to make any findings as to the justness and reasonableness of intrastate rates. Consequently if intrastate rates are initiated by the director general by filing them with the Interstate Commerce Commission, there is no provision for a determination of their justness and reasonableness, although such provision is made for interstate rates.

The contention of defendants, if sustained, would therefore inevitably lead to this conclusion. When both interstate rates and intrastate rates are initiated by the director general, by filing them with the Interstate Commerce Commission, the Commission can review the interstate rates, but not the intrastate rates. Thus the initiation of intrastate rates by the director general would be final.

When a similar power was claimed for the Interstate Commerce Commission it was condemned by this court. The case was that of *Interstate Commerce Commission* v. *Louisville & N. Ry. Co.*, 227 U. S. 88. It was said in the opinion:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our gov-

> ernment. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The power claimed for the President by plaintiffs in error is open to another constitutional objection which seems to us to be insuperable. It is well established that the regulation of rates is a legislative function. *Milwaukee Elec. R. & L. Co.* v. *Railroad Commission,* 238 U. S. 174, 180. As such it cannot be delegated to the President or any other executive officer. *Field* v. *Clark,* 143 U. S. 649, 692. Therefore, even if the Federal Control Act were intended by Congress to confer authority on the President to regulate intrastate rates, it did not accomplish such purpose in a constitutional manner and accordingly did not accomplish it at all.

## Effect of Section 15 of Federal Control Act Considered.

Apparently to remove all possibility of misconstruction, Congress added Section 15 to the Federal Control Act. That section is as follows:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

In considering this section, it is well to call attention, at the outset, to the fact that this proviso is not intended to confer the right to exercise the police power upon the several states, because such power is inherent in them and not in Congress. It has never been surrendered to the Federal Government, and therefore there was no need for Congress to authorize its continued exercise.

Tenth Amendment U. S. Const.

*South Carolina* v. *United States,* 199 U. S. 437.

*Keller* v. *United States,* 213 U. S. 138.

The power of each state to regulate the rates to be charged for public utility service performed wholly within the state is beyond question. The power is often called the police power. When it is exercised by the enactment of laws, or orders of administrative bodies, those laws and orders are usually called police regulations.

The term police regulation is no narrower than the term police power. This is shown by the statement, in the case of *Chicago B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561, that

> "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

It is further shown by the following quotation from the opinion in the case of *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* rendered by this court on March 24, 1919, reported on page

116 of the U. S. Supreme Court Advance Opinion No. 6:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state *in the exercise of its police power. Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *German Alliance Ins. Co.* v. *Lewis, Superintenednt of Insurance of the State of Kansas,* 233 U. S. 289, 407." (Italics ours.)

See, also, the case of *Hammer* v. *Dagenhart,* 247 U. S. 251.

These authorities are supported by a long line of decisions of this court and of the Supreme Courts of the various states.

It is thus evident that the term "police power" has been used in both the sense of the protection of the public health, safety, and morals, and of the public convenience, and the general welfare, and that the term "police regulations" has no other or different or distinct meaning than "police power." It is simply used to designate all regulations that may be made under the exercise of "police power," whether relating to the public health, safety, morals, convenience, or general welfare, and includes the regulation of public utilities as to their rates and charges, and all like matters which directly concern the public welfare. It seems plain, therefore, that Congress, by including Section 15 in the Federal

Control Act, has expressly recognized the right of the states to insist upon a compliance with the state laws relating to changes in intrastate rates.

No claim can be successfully urged that such compliance will affect the transportation of troops, war materials or government supplies, within the meaning of the exception in Section 15. The claim is made that, if Section 15 is construed to mean that the right to regulate intrastate rates is reserved to the states, it would possibly prevent the President from obtaining sufficient revenue to enable the railroads to be kept in an efficient condition and would thereby affect such transportation. Such would not be the case. It would only mean that the President must obtain authority to secure necessary additional revenue on intrastate traffic through the several state commissions, instead of through the Interstate Commerce Commission. That this would not be impracticable nor unduly burdensome is shown through the one practical application which it has had. We refer to the increase in express rates of July 1, 1918, which had been granted on intrastate traffic by the Interstate Commerce Commission. Application for a like increase was made by telegraph to the various state commissions and the increase was promptly granted, as requested, by all except five states. These five states have since granted such increases, subject to certain modifications necessary to meet local conditions.

The argument that the various states might refuse requested increases and thus create confusion, loses sight of the fact that the standard of rates in

the various states and in interstate commerce is the same; that is to say, just and reasonable rates. Such being the fact, it cannot be assumed that the state commissions will fail to perform their duty and authorize any rates which are not just and reasonable.

## Legislative History.

In the construction of the Federal Control Act it is of importance that the history of the legislation in Congress be considered. The course of legislation, the various amendments, conference reports, and even to some extent debates, are to be weighed in determining the construction which should be given to the act. That legislative history is as follows:

When Senate Bill 3752 passed the Senate it contained the following language:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the state in relation to taxation."

H. R. 9685 contained a like clause. In the House the Senate Bill was amended by striking out all after the enacting clause substituting the House Bill. The so-called Caraway amendment provided that after the word "taxation" at the end of Section 11 there should be added the following language:

> "Mr. Caraway: Mr. Chairman, I offer the following amendment:
>
> The clerk read as follows:
>
> 'Page 13, line 10, after the word "taxation" strike out the period and insert a comma and add the following language: "or the lawful commerce and police regulations of the several

All references to The Congressional Record which are made in this brief are to the advance sheets and not the bound volumes.

states, except wherein those regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds.'"

Mr. Caraway: Mr. Chairman, if any other gentleman wants to be heard on this amendment, I am willing to limit my time to less than five minutes and divide with him. The amendment proposes to come in at the end of line 10, which says that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation.

Mr. Barkley: If the gentleman from Arkansas will accept the amendment to strike out the words 'commerce and,' the committee will not oppose it.

Mr. Caraway: I will be willing to accept it without discussion. Mr. Chairman, I ask unanimous consent to strike out the words 'commerce and.'

The Chairman: The gentleman from Arkansas asks unanimous consent to modify his amendment as the clerk will report.

The clerk read as follows:

'Page 13, line 10, after the word "taxation," strike out the period and insert a comma, and add the following language: "or the lawful police regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds."'

The Chairman: The question is on the amendment. The question was taken and the amendment was agreed to."

Congressional Record, Vol. 56, page 3032.

It will be observed that the "regulation of rates" as provided by the several states was subject to the

act then before Congress and was put upon the same basis as the transportation of troops, war materials, government supplies, or the issue of stocks and bonds. In that form, the bill went to the conference committee. When the bill was reported out of conference, Section 10 appeared substantially in its present form. Cong. Rec., Vol. 56, page 3507 and 3556, Section 15 appeared as follows:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds: *Provided, however,* That no state or subdivision thereof, or the District of Columbia, shall levy, assess, or collect an amount of taxes from railroad property within the state or subdivision thereof, or the District of Columbia, while under federal control, in excess of the ratio which the total taxes of such state or subdivision thereof, or the District of Columbia, for the year previous to federal control."

In the House of Representatives, the report of the conference committee was accompanied by a statement by the managers on the part of the House, and reference to Section 15 is as follows:

> "The conferees agreed to strike out Section 16 of the House amendment, and substituted therefor a new section, as set out in Section 15 of the conference report, the effect of which change is to provide that no state or subdivision thereof shall increase taxation on railroad property while under federal control in excess of the increase that might be made on other taxable property in the state during such

period. The substitute section also provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

Congressional Record, Vol. 56. page 3556.

Upon further conference, the bill was re-reported to the respective houses. Section 15 then appeared as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

Cong. Rec., Vol. 56, pp. 3715 and 3740.

In the statement of managers on the part of the House, the following was stated with reference to Section 15:

"The conference agreed to strike out Section 16 of the House amendment and substituted therefor a new section as set out in Section 15 of the conference report. The substitute section also provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds.

The Senate receded from its disagreement to

Section 17 of the House amendment, and agreed to the same."

Cong. Rec., Vol. 56, page 3741.

It is clear from the history of this law that it was never intended that the power of the states over purely intrastate rates should in anywise be molested.

**Applicability of Present State Laws.**

It is claimed that the reservation to the states of "the power of taxation and the lawful police regulations of the several states" is of no effect because no state has ever enacted any law applicable to railroads which are operated by the Federal Government; that until the power is exercised by the passage of appropriate legislation, no state law is being violated.

Carrying this proposition to its logical conclusion, it would follow that no state in the Union today could tax the property or earnings of railroads under federal control, nor could such state take any action against said railroads for the protection of the health, commerce, or welfare of its citizens. Its power to regulate the speed of trains, to improve station facilities and see that they are kept in a sanitary condition, to require reasonable train service and safe operation, to reduce grade crossings, and all such matters would have to rest in abeyance until suitable legislation could be passed by the state.

To assert the proposition is to deny it. Congress had knowledge of the large body of police legisla-

tion in the various states. In the Federal Control Act, Congress said in effect:

The President having taken over the control and operation of the railroads, may do certain enumerated things specified in the act, but subject to the provision that nothing done by him shall amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the states.

Congress was dealing with existing laws and intended by said provisions to preserve unimpaired that large and useful field of legislation, regulation, and practices which have developed during the past thirty-five years.

The director general has placed a practical construction upon the provision in his order No. 58, issued last March, which reads as follows:

> "Transportation systems under federal control continue subject to the lawful police regulations of the several states which were and are applicable to privately operated transportation systems, in such matters as spur tracks, railroad crossings, safety appliances, track connections, train service, the establishment, maintenance, and sanitation of station facilities, the investigation of accidents, and all other matters of local service, safety, and equipment. It will be the policy of the director general to cause the orders of the state commissions in these matters to be carried out."

It seems to us that the argument that the present state laws are inapplicable is answered by the decision of this court that the United States is a corporation. *Chisholm* v. *Georgia,* 2 U. S. 419. All of

the state laws expressly apply to railroads operated by corporations and individuals. Therefore, if it be held that the railroads are operated by the government they are operated by a corporation; and if they are held to be operated by the President, then they are being operated by an individual. In either case the operation comes within the provisions of the state laws.

It is not an answer to this argument to say that the term *corporations* as used in the various state regulatory laws, was not intended to mean corporations such as the United States, because it was not contemplated that the United States would ever operate the railroads. This is so for the reason that the state laws were passed long after the decision referred to, with a presumptive knowledge of a broad scope of the word, and yet its application was not confined, in the various acts, to corporations organized under the laws of the various states or of Congress.

It was held in the case of *Smyth* v. *Ames,* 169 U. S. 466, and *Reagan* v. *Mercantile Trust Company,* 154 U. S. 413, that the state regulatory laws applied to railroads operated by corporations organized under the laws of Congress, although at the time of the passage of the acts the only railroads operating in the United States were those organized under the state laws.

The fact that the government was not operating the railroads at the time of the passage of the state laws would not necessitate the placing of a restricted meaning upon the word corporation. On the con-

trary, it should be given its broad meaning wherever that is necessary to carry out the apparent purposes of the act as is the case here.

This course has been uniformly applied by this court in construing the federal constitution. As an example of such construction, attention is called to the meaning given to the word commerce. It has been held to apply to communication by telephone and telegraph and various other instrumentalities, although they were not in existence at the time the constitution was adopted, and could hardly have been said to have been within the contemplation of the framers of that document.

Where the state laws expressly apply to lessors of railroads the case is even stronger for it is now almost uniformly held that the relationship existing between the government and the railroad corporation is that of lessor and lessee. In such cases then the argument of the plaintiff in error would necessarily fall.

We submit the rule to be that, even though the railroads are operated as a governmental agency, the local laws will control unless Congress, for the purpose of protecting such agency in its governmental purposes, has by appropriate and reasonable legislation excluded such agency from state interference. This rule flows from and is based upon the police powers of the state and its sovereign control over its local and domestic affairs.

This rule is clearly expressed on page 204, Encyclopedia of Supreme Court Reports, Vol. 41:

"A corporation organized under the laws of

the United States is subject to the control of the state as to rates which are wholly within the state. The fact that it receives all its franchises from Congress, that among those franchises is the right to charge and collect tolls, does not exempt it, as to business done wholly within the state, from the control of the state in all matters of taxation, rates, and other police regulations."

Citing:

*Reagon* v. *Mercantile Trust Co.*, 154 U. S. 413.

To the same point:

*Thomson* v. *Union Pacific Ry.*, 76 U. S. 579, 590-1.

**This is not a Suit Against the United States.**

We understand that the question of whether this is a suit against the United States was expressly waived in the State Supreme Court. Inasmuch as we have not received the brief of the plaintiffs in error in this court and are therefore not advised as to whether or not the point will be raised upon this hearing, we desire to submit the following points and authorities upon the proposition:

Section 10 of the Federal Control Act of March 21, 1918, provides that:

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no

> defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferrable prior to the federal control of such carrier * * *."

The above quoted section makes it clear that Congress intended that the state courts were to retain their previous jurisdiction over railroads, even while under federal control. What else could Congress have meant when it said:

> "Actions at law and suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," and that in any such action no defense should be made thereto "upon the ground that the carrier is an instrumentality or agency of the Federal Government"?

This is a suit against a carrier, within the contemplation of the act, and if such suit is permitted at all, the defense that the suit is one against the United States, being necessarily based upon the proposition that the defendant is an agency of the Federal Govermnent, is plainly excluded.

But, irrespective of this last mentioned specific provision, the other clause permitting suit to be brought against the carrier "as now provided by law" is in itself sufficient to prohibit such carrier defending on the ground that the suit is one against the government.

If such defense were good, the authorization for bringing "actions at law or suits in equity" * * *

"against such carriers" would be a nullity. It is well recognized that no part of a statute will be construed so as to be of no force or effect if such construction may be avoided.

However, irrespective of the provisions of Section 10 of the Federal Control Act, above referred to, this action is not an action against the government. The controversy is not of a political nature, nor does it extend to the Constitutional rights or authority of the President. In so far as the President is concerned here, it is by reason of the power delegated to him by Congress and the question as to the extent of the power delegated is not affected by his political office or standing. As said by Chief Justice Marshall, in *Marbury* v. *Madison,* 5 U. S. (1 Cranch.) 137, 166-171:

> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety of judicial interference is to be determined."

This action is not brought to interfere with the property of the railway company. It is not brought to interfere with or control the exercise of discretion or authority on the part of any officers or agents of the executive department of the government, as to those duties which the law requires them to perform and as to those matters which come within their jurisdiction. It is to enjoin such officers or agents from acting unlawfully, and as to matters concerning which they are given no jurisdiction or authority under the act.

That such an action is within the jurisdiction of

the courts—either state or federal—is amply sustained by the authorities.

The leading case is that of *United States* v. *Lee*, 106 U. S. 196, which has been followed by a long line of authorities. The case was ejectment. The defendants were military authorities, holding property at Arlington, Va., under the direction of the President, as a military station and a national cemetery, and it was alleged not only that the defendants were acting under the direction of the executive department, but that their possession was the possession of the United States. Accordingly the attorney general appeared, insisting that the court had no jurisdiction and the action should be dismissed. As was said by Mr. Justice Miller, delivering the opinion of the Supreme Court:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power."

The jurisdiction of the court was sustained. It was held that the court was competent to decide the issues before it, and having found that title was in the plaintiff, and having rendered judgment against the defendants, its judgment was affirmed. It was said in the opinion:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and bound to obey it. * * *
>
> Shall it be said, in the face of all this, and of

the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority and without any compensation, because the President has ordered it and his officers are in possession?

If such is the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'stop here; I hold by order of the President, and the progress of justice must be stayed!' "

Another case, having a direct bearing upon the point under discussion, is that of *Osborn* v. *U. S. Bank,* 9 Wheat. 738. The case was this: The State of Ohio having levied a tax upon the branch of the bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the State of Ohio, was about to proceed to collect said tax by seizure of the money of the bank in its vaults, and an amended bill alleged that he had seized $100,000 and, while aware that an injunction had been issued by the Circuit Court of the United States

on the prayer of the bank, the money so seized had been delivered to the state treasurer.

One of the objections to the jurisdiction of the court was the conceded fact that the State of Ohio, though not made a party to the bill, was the real party in interest; that all the parties sued were her officers, concerning acts done in their official character and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued that what could not be done directly could not be done by suing her officers. It was insisted that, while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction.

The Supreme Court of the United States affirmed the decree ordering a restitution of the money, and, in its opinion said:

> "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same

> remedies against the agent employed in doing the wrong, which they would afford him could his principal be joined in the suit."

The case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, is an important authority upon this branch of the case. In that case suit was instituted in the Supreme Court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing original proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. It was alleged in the bill that the lines were established by the secretary unlawfully, although authority therefor was claimed under a certain act of Congress. The bill was demurred to and one of the grounds of demurrer was that "This is virtually a suit against the United States." Upon that point it was said in the opinion:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Cases cited.) And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (Cases cited.) And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred."

It is important to note also that the controversy is not removed from the sphere of the judicial power simply because it relates to actions claimed to have been directed to a war end. If the mere fact of an alleged war purpose makes a controversy inherently nonjusticiable, the principle would apply with greatest force to the action of military commanders under the direction of the commander-in-chief. For while Congress may declare war, it is to the President, as commander-in-chief, to whom is committed, by the Constitution, the direction of military operations. This broad authority, for the actual conduct of the war may not be impaired, even by Congress itself. (*Milligan's case,* 4 Wall. 2, 139.)

Yet, even in the actual zone of conflict, when a military commander takes private property to prevent it falling into the hands of the enemy, or for the purpose of converting it to the public use, the urgent necessity which justified this course is the proper subject of inquiry by the courts. If such necessity is found not to exist, such military commander is a trespasser and cannot justify by showing the orders of his superior officer. The alleged war purpose, even in the actual conduct of campaigns, does not make the controversy nonjusticiable or oust the courts of jurisdiction to inquire whether the property of the citizen has been invaded rightfully. *Mitchell* v. *Harmony,* 13 How. 115.

It is also established that a controversy with respect to the lawfulness of the action of a naval officer in seizing a ship is none the less justiciable

because he was acting under the direct instructions of the President. *Little* v. *Barreme*, 2 Cranch. (U. S.), 170.

In this case it was held that instructions from the President, to a naval officer, to seize property illegally, did not protect the officer from damages. The officer had seized a Danish brigantine under suspicion of violating the Act of Congress, known as the non-intercourse law. The fifth section thereby authorized the President to give instructions to the commanders of the public armed ships of the United States to stop and examine vessels of the United States under certain circumstances. The President issued explicit instructions, which, however, were found to go beyond the authority conferred by the Act of Congress. Mr. Chief Justice Marshall, in delivering the opinion of the court, said:

> "These orders which were given by the executive under instructions of the Act of Congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce the suspicion that the vessel was *American*, would excuse the captor when the vessel appeared in fact to be neutral.
>
> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a

right, they might yet excuse from damages. I was very much inclined to thing that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. * * * I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against the government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

## Conclusion.

For the foregoing reasons the writ of error in this case should be dismissed and the judgment of the Supreme Court of North Dakota affirmed.

Respectfully submitted,

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PUBLIC SERVICE COMMISSION OF WYOMING.

PUBLIC UTILITIES COMMISSION OF UTAH.

-11-

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No. 976.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

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WALKER D. HINES, as Director General of Railroads, and NORTHERN PACIFIC RAILWAY COMPANY, Plaintiffs in Error,

*vs.*

STATE OF NORTH DAKOTA, Ex Rel. WILLIAM LANGER, Attorney General.

---

ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

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ARGUMENT OF

JOHN BARTON PAYNE
*For Director General of Railroads.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

| | |
|---|---|
| Walker D. Hines, as Director General of Railroads, and Northern Pacific Railway Company, Plaintiffs in Error, vs. State of North Dakota, ex rel. William Langer, Attorney General. | No. 976. |

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## STATEMENT.

This case involves the power of the President to initiate intrastate rates on railroads being operated by the United States. The Supreme Court of North Dakota in an original proceeding by the State, ex rel. its Attorney General by a vote of 3 to 2 on final hearing issued a decree restraining the Director General of Railroads from collecting intrastate fares and charges initiated as prescribed in Section 10 of the Act of Congress, approved March 21, 1918, called the Federal Control Act. Its action is here by writ of error for review.

## THE COMPLAINT.

The gist of the complaint (Transcript 1-5) is (Sec. 3), that Walker D. Hines, Director General of Railroads (successor to William G. McAdoo), is, by virtue of the Acts of Congress of August 29, 1916, and the Federal Control Act, and the Proclamation of the President, in possession and control of the railroad systems of the Country, exercising supervision and control over intrastate as well as interstate business.

That (4) Section 4725, revised code of North Dakota, provides that no railroad corporation may change its fares, rates and charges without first filing its schedules with the Board of State Railroad Commissioners, and (5) no petition asking an increase of rates, has been filed; that (6) on May 25, 1918, William G. McAdoo, Director General of Railroads, issued General Order No. 28, effective June 25, 1918, raising passenger fares and baggage charges, and effective June 10, raised freight rates 25 per cent., without complying with the State statute. That (7), said order so put into effect was unauthorized by, and contrary to, said Acts of Congress and the proclamation of the President and does not affect the transportation of troops, war material, Government supplies, or the issue of stocks and bonds. That in raising the rates the Director General assumed to act under and by virtue of said Acts of Congress, which do not authorize any Federal authority to initiate or put into effect intrastate rates in said State; that said rates and charges are founded upon a misconstruction of the powers delegated by said Acts of Congress; and (8) are unreasonable.

The Director General, by his answer, relies on said Acts of Congress, passed as war measures, the Proc-

lamation of the President taking over the railroads as an instrumentality of the war, the Proclamation of March 29, 1918 (Transcript 12) authorizing the Director General to execute all and singular the powers conferred upon the President, and sets out (Tr. 14) said General Order raising said rates which embraces the certificate showing the necessity for said increase as is contemplated by Section 10 of the Act.

The order provides:

> "Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and
>
> "Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an Act of Congress approved August 29, 1916, entitled . . . , shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an Act of Congress approved March 21, 1918, etc."

It is also shown that said order was put into effect in June, 1918, as provided therein, and remains in effect, and that large revenues have been collected thereunder, in all the States of the Union.

The validity of this exercise of the war power is therefore presented as a question of law.

## ARGUMENT.

### I.

We submit:

THE WAR POWERS OF THE CONGRESS ARE LIMITED ONLY BY THE NEEDS OF THE GOVERNMENT. THESE POWERS WERE AMPLE TO AUTHORIZE THE PRESIDENT TO ASSUME FEDERAL OPERATION AND CONTROL OF THE RAILROADS, TO INITIATE RATES AND CHARGES FOR ALL RAILROADS UNDER FEDERAL CONTROL, INTRA AS WELL AS INTER STATE, AND THE ORDER IN QUESTION WAS A VALID EXERCISE OF SUCH POWER.

STATE LINES DO NOT ABRIDGE OR AFFECT THE WAR POWERS OF THE CONGRESS.

The Constitution, Article I, Section 8, paragraphs 11, 12, and 18.

The Federalist, No. 33.

*McCulloch* v. *Maryland,* 4 Wheaton, 316-405.

*The Legal Tender cases,* 79-457.

No. 417, *McKinley* v. *U. S.,* and other cases decided at this Term.

This, we believe, is not in terms challenged; and yet the denial to the President of the right to initiate intrastate rates from which so large a part of the revenues for railroad service is derived, calls to mind how intimately the fathers of our country associated the power to make war, with the power to levy money.

On September 17, 1787, after the great convention had completed its work, Washington transmitted a letter from the Convention to the Continental Congress in which the work of the Convention was thus summarized:

> "The friends of our country have long seen and desired that the power of making war, peace and

treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually invested in the General government of the Union."

1.

THE POWERS OF THE CONGRESS OVER INTRASTATE RATES IS PLENARY WHEN A FEDERAL INSTRUMENTALITY OR NATIONAL PURPOSE IS INVOLVED.

This was made clear in *Regan* v. *Trust Co.*, 154-413, involving the Pacific railroad, chartered under an Act of Congress. The court said:

> "Similarly we think it may be said that conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is nothing in the Act creating this Company which indicates an intent on the part of Congress to so remove it and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State, which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

And *Smyth* v. *Ames*, 169-466, involving construction of the Act of 1862 *re Union Pacific Railway*, and rates made by Nebraska:

> "The better interpretation of the Act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass with power reserved to Congress to intervene under certain circumstances and fix rates which the corporation could reasonably charge and collect."

2.

When and to what extent the Congress will exercise power over intra rates *re* a Federal instrumentality is for it alone to determine.

This is aptly illustrated by the *Minnesota Rate Case*, particularly pertinent here because the controlling fact of unified control over inter and intra state rates, absent in the Act to Regulate Commerce, is conspicuously present in the Federal Control Act. The Court (230-420) there said:

> "Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic."

In view, therefore, of the unified national control provided by the Congress there is no doubt of the power to initiate intrastate rates.

If this does not follow we have this singular situation: The Government controls the railroads as a war instrumentality, is responsible for all expenses, charges, and the payment of just compensation, while the control over the large revenues arising from intrastate business would be left with forty-eight different States, a calamity the Congress plainly could not have intended.

3.

The power being clear, the question is narrowed to this:

DID THE CONGRESS BY THE ACT OF AUGUST 29, 1916, AND THE FEDERAL CONTROL ACT, AUTHORIZE THE PRESIDENT TO INITIATE INTRA, AS WELL AS INTER STATE RATES ON RAILROADS UNDER FEDERAL CONTROL, AND IS THE ORDER, MADE PURSUANT TO SAID ACTS, VALID?

The contention of the defendant in error to the contrary rests upon a construction counsel attempt to give Section 15 of the Federal Control Act, to the effect that by the use of the words "lawful police regulations", all power to regulate intrastate rates, notwithstanding the particular provisions of Section 10 to the contrary, and the manifest purpose of the whole Act to establish unified national control for war purposes, was reserved to the States.

When the whole act, letter and spirit is considered, the overwhelming conclusion results that the Congress deliberately established a national plan of federal control inconsistent with such an interpretation.

The language is:

> "SEC. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the *existing laws or powers* of the States in relation to taxation, or *the lawful police regulations* of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

The words "lawful police regulations" as here used designedly have less potency than the words "laws and

powers of the States" used in relation to taxation, and are intended to embrace only such ordinary matters as are commonly referred to as police regulations. Otherwise, there would have been no change in the sentence and "laws and powers" would have been used in reference to the police power instead of the lesser word regulations, as actually used.

This was not an accident; there is a manifest dropping down from the words "existing laws and powers of the States used in relation to taxation" to the words "lawful police regulations", which signify less than existing laws and powers.

4.

We submit that:

THE ACTS OF CONGRESS AND THE PRESIDENT'S PROCLAMATION PLAINLY CONTEMPLATE AND PROVIDE FOR THE OPERATION OF THE RAILROADS AS A UNIFIED AND COORDINATED NATIONAL SYSTEM OF TRANSPORTATION FOR WAR PURPOSES, WITH POWER TO THE PRESIDENT TO INITIATE RATES; INTRASTATE RATES BEING NECESSARILY INCLUDED IN THE WORDS "RATES, FARES, CHARGES, CLASSIFICATIONS, REGULATIONS, AND PRACTICES" AS USED IN SECTION 10 OF THE ACT.

The President acting under the Act of 1916, by his proclamation, empowered the Director General to operate and control the systems of transportation as a war instrumentality freed from the restraint of state statutes, when necessary.

The Congress following generally the Proclamation, provided for a single uniform and coordinated operation and control.

To accomplish this, unity of rate-making was essential and was in terms provided by Section 10, all rates to be initiated by him subject to a review by the Interstate Commerce Commission, and in its review the Commission was required to give consideration to a certificate of the President reciting the needs of the Government for revenues as specified in the Act, adequate to meet the expenses of such unified operation.

This is clear from the Federal Control Act, and was emphasized by the President in his statement accompanying the Proclamation.

The President said:

> "This is a war of resources no less than of men, perhaps more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and a simplified method of coordination which have not proved possible under private management and control."

There was no more room for two separate systems of rate-making, than for separate systems of operation, which experience had shown to be a failure.

The phrase, therefore, "lawful police regulations" must be read in the light of this national plan and purpose and such effect given to it as is consistent with the entire Act, rather than such a construction as will destroy the spirit and purpose of the Act and at this late day give to the words an exaggerated and artificial meaning.

## II.

## THE BASIC ACTS.

The national purpose will be clear as we consider the basic acts:

The first, was the *"Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916,* containing this provision:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

When this was passed, the world war had been in progress two years. Seven months thereafter (April 6, 1917), war with Germany was declared; and on December 7, 1917, with Austria-Hungary. The demand over there for men, money, food and war supplies was insistent and persistent.

By December the severest winter known for a generation was upon us. There was a shortage of men due to enlistments in the Army and Navy; to the sending of regiments of railroad men to keep the transportation systems of France in operation; there was scarcity of motive power because some 5,000 engines had to be sent to France and Russia; the effort to move hundreds of

thousands of troops, and enormous quantities of supplies overseas, congested the terminals until movement was well nigh impossible; priority orders were issued in an effort to expedite movement, but there was no central single authority authorized by law to act. The result was the transportation systems of the country were greatly impaired, and action to meet the emergency was imperative. The Federal control of the railroads was the one answer. But for this there was grave danger that the might and power of the United States could not have been gotten to the theatre of the war, and our vast resources in men and material, and enormous expenditures in preparation would have availed little. The war had truly become a transportation problem.

## III.

## THE PROCLAMATION.

Accordingly, December 26, 1917, the President by Proclamation, assumed the possession, operation and control, effective at 12 o'clock noon, December 28, 1917, of each and every system of transportation, and the appurtenances thereof, located within the continental United States, consisting of railroads, and owned or controlled systems of coastwise and inland transportation, with terminals, elevators, warehouses, telegraph and telephone lines, operated as a part of such systems to the end that the same be utilized for the transportation of troops, war materials, and equipment to the exclusion as far as necessary of all other traffic thereon, and so far as such exclusive use be not necessary, then in the performance of such other service as the national interest may require, in the business of common car-

riers, and after appointing a Director General to operate the systems, provided:

> "Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to existing statutes and orders of the Interstate Commerce Commission, and to the statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, made by said Director shall have paramount authority, and be obeyed as such."

State statutes were to be controlling only until the Director General found that an order to the contrary was necessary; such an order as is here involved.

## IV.

## THE FEDERAL CONTROL ACT.

The Congress was then in session, and promptly began the consideration of adequate legal machinery to provide for compensation to the carriers, and the operation and control of the transportation systems as a national unit. In due time the Federal Control Act was passed. The first section provides for an agreement with the carriers; failing in this the carriers are remitted to legal proceedings under Sections 2 and 3. Section 4 provides an added sum by way of interest on the cost of additions, etc., made by the carriers while under Federal control. Five deals with dividends. Six creates revolving fund of $500,000,000 to provide for expenses of operations, payment of compensation, making additions, etc., and for terminals, equipment,

etc. Seven deals with the issue of securities. Eight authorizes the President to execute his powers through such agencies as he may elect, including the Interstate Commerce Commission and any department of the Government. Nine continues in force the Act of August 29, 1916, and confers upon the President added powers to give effect to the Act. Ten deals with actions at law, the removal of causes, etc., and authorizes the President to initiate and the Interstate Commerce Commission to review, rates on all roads under Federal control. Other sections deal with essential matters, even to questions of accounting.

Nowhere is any distinction between interstate and intrastate rates or business mentioned, manifestly, for the reason that the Congress was not dealing with commerce as such, but with war.

The more important Sections may be examined in some detail.

They are:

(1) The President, having in time of war taken over the possession, use, control, and operation (called Federal control) of certain railroads and systems of transportation (called herein carriers) is hereby authorized to agree with any such carrier, that during the period of Federal control it shall receive as just compensation an annual sum, &c.; any railway operating income accruing during Federal control in excess of such just compensation shall remain the property of the United States.

Every such agreement shall contain adequate and appropriate provisions for maintenance, repair, renewals, and depreciation, in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as at the beginning of Federal control.

The provision *re* the short lines is important because Federal control over these had not been assumed. The Congress placed them under Federal control; hence it cannot be claimed that in providing for the initiation of rates by the President and review by the Commission, intrastate roads and intrastate rates and business were overlooked.

This is the language: (Paragraph 7, Section 1.)

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with railroads of which the President has taken possession, or which connections therewith and is engaged as a common carrier, shall be held and considered as within 'Federal control', as herein defined."

Section 10 provides that the carriers are subject to Federal and State laws except as is inconsistent with the provisions of this Act *or with any order of the President,* in terms giving to the President power by an order to supersede both Federal and State laws.

## POWER TO INITIATE RATES.

This power is conferred on the President as to all railroads under Federal control, and is subject to no limitation except (a) They must, all conditions considered, be reasonable and just, and (b) are subject to review by the Interstate Commerce Commission; but become effective immediately, the Commission being deprived of its power to suspend, pending final determination.

The transportation systems to be operated under a unified and coordinated national control.

This is further emphasized by the following quotations from Section 10:

"That during Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulation, and practices by filing same with the Interstate Commerce Commission, which said rates, etc., shall not be suspended pending final determination."

"Said rates, fares, etc. etc., shall be reasonable and just and shall take effect at such time, and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control."

In determining any question concerning any such rates, etc., the Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control, and not in competition.

The machinery is provided, in that the Commission was authorized to make findings and orders as authorized by the Act to Regulate Commerce, provided that when the President shall find and certify to the Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses to pay railway tax accruals and compensation to the carriers operating as a unit, it is necessary to increase the railway operating revenues, the Commission shall take into consideration such finding and certificate by the President, together with such recommendations as he may make.

Section 11 provides penalties for impeding the possession, operation, and control of the railroads, embezzlement, etc., to the same extent as to persons em-

ployed in the regular service of the United States. 12 provides that moneys and other property derived from operations are the property of the United States, and if the revenues are insufficient, the deficit shall be paid from the revolving fund. 14,—Federal control to continue during the war for a reasonable time thereafter not exceeding 21 months, with power to the President to relinquish. 16 declares the Act to be emergency legislation to meet conditions growing out of the war.

This is the plan for unified national control and operation deliberately adopted by the Congress for all railroads during Federal control.

In view of this comprehensive and exhaustive plan of national control is it to be seriously contended in this presence that the words "lawful police regulations", as used in this Act, are to have the effect of striking down and rendering impotent this necessary and adequate national plan so carefully adopted by the Congress and so essential to the needs and to the welfare of the country?

## V.

## POLICE REGULATIONS, WHAT IS EMBRACED IN, AS USED IN SECTION 15.

Whatever may be included in the words "police powers", as ordinarily used, it is clear that the words "police regulations" are here used in sharp contrast to the words "laws and powers" as applied to taxation; and that the word "regulations" was not intended to include, and did not include the powers of the States over intrastate rates.

The inquiry, therefore, naturally arises what the Congress intended to be embraced therein.

It is to be assumed that the Congress was familiar with the decisions of this Court, and had in mind decisions affecting police regulation. If so, the answer is instant.

For instance:

Cases requiring the fencing of tracks as a prevention against fire, *Missouri Pacific* v. *Humes,* 115-512; the segregation of the races, *Plessy* v. *Ferguson,* 163-537, *Chesapeake* v. *Kentucky,* 179-388; in the interest of safety regulations as to the qualifications of employees, *Nashville, etc.* v. *Alabama,* 128-96, *Smith* v. *Alabama,* 124-465; heating cars, New York, 165-628; questions affecting injuries to employees, *Atchison* v. *Matthews,* 174-96; *St. Louis, etc.* v. *Paul,* 173-404; to require certain stops to be made, *Lake Shore, etc.* v. *State,* 173-385; fumigating cars, Covington, 235-537; and other matters such as grade crossings, bell-ringing, etc., to prevent accidents.

## VI.

## THE POLICE POWER IS NEVER PERMITTED TO INTERFERE WITH THE NATIONAL PURPOSE OR NATIONAL CONTROL.

The police powers, even if used in Section 15 in the larger sense and not restricted to mere regulations, as the fact here is, would still be in conflict with the letter and spirit of the Federal Control Act and would have to give way to the intention of the Congress, the whole act being considered and effect given to every provision.

Chief Justice Marshall, in *Sturges* v. *Crowninshield,* 4 Wheaton, 122-202, said:

> "The spirit of an instrument * * * is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."

Police regulations if otherwise effective must yield to the national purpose. In *Jacobson* v. *Massachusetts,* 197-11, this pertinent language was used (24):

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, must yield in case of conflict with the exercise by the general Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

And in *Railroad* v. *Husen,* 95-465, this Court (471) said:

> "But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government. It was said in *Henderson* v. *Mayor of New York,* 92-259, to 'be clear from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to the powers conceded to belong to the States.' "

And by Chief Justice Marshall in *Gibbons* v. *Ogden*:

> "Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred upon Congress by the Constitution."

Unless, therefore, the Congress plainly intended to divide the power to regulate rates, inter and intra state, which it clearly did not, no such result will be read into the Act by construction or interpretation, since this would be plainly to contravene the purpose of the Congress to establish unified national control.

In conclusion, therefore, we earnestly urge that the decree of the Supreme Court of North Dakota be reversed with instructions to dismiss the complaint.

JOHN BARTON PAYNE,
*Counsel for the Director General of Railroads.*

Office Supreme Court, U. S.
FILED
MAY 2 1919
JAMES D. MAHER,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1918.**

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## No. 976.

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THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

*vs.*

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

---

## BRIEF OF DEFENDANT IN ERROR.

---

WILLIAM LANGER,
*Attorney General;*
FRANK E. PACKARD,
W. V. TANNER,
*For Defendant in Error.*

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*vs.*

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

---

## BRIEF OF DEFENDANT IN ERROR.

---

### (1) STATEMENT OF THE CASE.

The nature of the case is thus stated by the Supreme Court of the State (Trans. of Record, p. 20):

"On the application of the above-named plaintiff an alternative writ of mandamus issued out of this court, commanding the defendants to desist from collecting any fares, rates, or charges for carrying passengers, freight, and baggage between points wholly within the State of North Dakota, other than those stated in the schedules on file in the

office of the Board of Railway Commissioners of the State; or that they show cause why they have not done so. The foregoing writ issued in accordance with the prayer of a complaint and petition alleging, among other things not material to be noticed, that, by virtue of an Act of Congress of August 29, 1916, the President of the United States issued a proclamation on December 26, 1917, following which he assumed possession and control of the railroad systems of the United States, and that he has been in such possession since January 1, 1918; that on May 25, 1918, William G. McAdoo, predecessor in office of the defendant Walker D. Hines, as Director General of Railroads of the United States, issued General Order No. 28, whereby he directed the railroads, under his control to put into force and effect on June 10, 1918, certain passenger fares and baggage charges, and on June 25, 1918, certain freight rates, which fares, charges, and rates were in excess of those previously authorized to be collected on the intrastate commerce of the defendant company within the State of North Dakota.

"Separate answers were filed by the railroad company and by the said Hines, as director general. The answer of the railroad company alleges that from December 28, 1917, until on or about August 1, 1918, the director general exercised possession and control of its transportation system through the officers and agents of the defendant company; but that since August 1, 1918, such possession and control have been exercised through various agents appointed by the director general. Denying that the defendant company has any power or authority over the tariffs complained of, it asks that the action be dismissed as to it.

"The answer of the director general sets forth the legal basis relied upon to support General Order No. 28, and asks that the alternative writ be quashed."

The Supreme Court of the State ordered that a peremptory writ be issued in accordance with the views expressed in its opinion (Trans., p. 18).

## (2) ACTS OF CONGRESS AND PROCLAMATIONS OF THE PRESIDENT.

In the act of Congress of August 29, 1916, making appropriations for the support of the Army, was a so-called "rider", reading as follows (29 Stat., p. 645):

> "The President, *in time of war* (italics ours), is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the *transfer or transportation of troops, war materials and equipment,* or for such *other purposes connected with the emergency* as may be needful or desirable."

This paragraph was inserted in the Army Appropriation Bill during the outbreak along the Mexican border and prior to the entry of the United States into the war with the Teutonic powers.

On April 6, 1917, Congress, by joint resolution, declared a state of war to exist between the United States and Germany, and authorized and directed the President "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government" (U. S. Comp. Stat., 1918, Compact ed., p. 17).

On December 7, 1917, by a like resolution, a state of war was declared to exist between the United States and Austria-Hungary (Id., p. 17).

On December 26, 1917, the President issued a proclamation in which, after referring to the declarations of war and the act of August 29, 1916, he states (U. S. Comp. Stat., 1918, Compact. ed., p. 274):

> "It has now become necessary in the national defense to take possession and assume control of certain systems of transportation and *to utilize the same,*

> *to the exclusion as far as may be necessary of other than war traffic thereon, for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war* (italics ours)."

The proclamation further recites that the President does thereby, through Newton D. Baker, Secretary of War, "take possession and assume control * * * of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, and consisting of railroads, owned or controlled systems of coastwise or inland transportation, engaged in general transportation, whether operated by steam or electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, * * * to the end that such systems of transportation be utilized for the transfer and transportation of troops, war materials, and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers."

The proclamation directs that the "possession, control, operation, and utilization of such transportation systems" shall be exercised through William G. McAdoo, who is appointed and designated Director General of Railroads. The proclamation states:

> "Said director general may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, officers, and employees of said systems of transportation. Until and except so far as said director general shall from time to time by general or special orders otherwise provide, the boards of directors, officers, and employees of the various transportation systems shall

continue the operation thereof in the usual and ordinary course of business of common carriers, in the names of their respective companies.

"Until and except so far as said director general shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes of the United States and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director general shall have paramount authority and be obeyed as such."

The director general is empowered to enter upon negotiations with the several companies "looking to agreements for just and reasonable compensation for the possession, use, and control" of the respective properties.

The payment of dividends and other obligations theretofore declared is authorized, and the payment of dividends and other obligations is provided for subject to the approval of the director general.

The proclamation further states:

"Except with the prior written assent of said director general, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders otherwise determine."

Thereupon the director general took over the transportation systems specified in the proclamation.

On March 21, 1918, Congress adopted what is known as the "Federal Control Act." This act is entitled: "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their

owners, and for other purposes." As disclosed in its title, the act treats the taking over of the railroads as *having been accomplished* and deals with (1) the operation of the systems; (2) the compensation of the owners of the properties; and (3) other matters incident to Federal operation (U. S. Comp. Stat., Compact Ed., pp. 456-60).

Section 1 of the act provides:

> "The President, *having in time of war taken over* (Italics ours) the possession, use, control, and operation (called herein Federal control) of *certain railroads* and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier * * * that it shall receive as just compensation an annual sum * * * ."

Section 2 provides for the payment of compensation in cases where no agreement is made.

Section 3 provides for arbitration upon the question of compensation in case of inability to agree, and for suits in the Court of Claims.

Section 4 relates to increases of compensation on account of betterments, extensions, etc.

Section 5 limits the amount of dividends that may be paid without the approval of the President.

Section 6 appropriates the sum of $500,000,000, which, together with the operating revenues of the carriers, is to be used as a revolving fund for the purpose of paying the expenses of Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment.

This section also covers the subject of additions and improvements, either by the carrier or by the President.

Section 7 relates to the funding of maturing obligations of the carriers and the issuance of further obligations by the carriers with the approval of the President.

Section 8 confers upon the President the power to desig-

nate the agencies by whom Federal control shall be exercised. This section reads as follows:

> "That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and co-operation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law."

Section 9 provides that the act of August 29, 1916, "shall remain in force and effect except as expressly modified and restricted by this act," and provides that the President, in addition to the powers conferred by this act, "shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

Section 10 reads:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the

Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be retransferred to the court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control.

"During the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and

> equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

Section 11 prescribes the penalties for violations of the act.

Section 12 relates to the disbursement of the operating receipts of the carriers, the payment of taxes, accounting, etc.

Section 13 relates to pending suits under the Sherman Anti-Trust Act.

Section 14 defines the period of Federal control and limits such Federal control to one year and nine months following the ratification of the treaty of peace.

Section 15 provides:

> "Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

Section 16 declares the act "to be emergency legislation enacted to meet conditions growing out of war."

Following the passage of the Federal Control Act of March 21, 1918, and on March 29, 1918, the President issued a proclamation (U. S. Comp. Stat. 1918, Compact Ed., p. 458) which is in effect a general power and authority conferring upon William G. McAdoo, Director General of Railroads, "either personally or through such divisions, agencies, or persons as he may appoint" to make agreements with the carriers, "to issue any and all orders which may in any way be found necessary and expedient in connection with the

Federal control * * *, and generally to do and perform all and singular all acts and things, and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform."

The act of August 29, 1916, the proclamation of December 26, 1917, and the act of March 21, 1918, are printed in Appendix I.

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**ARGUMENT.**

## (3) THE WAR POWERS OF CONGRESS AND THE PRESIDENT.

That the power of Congress and of the President in respect to the taking over of railroads has its source in the "war powers" of the Government, will probably not be questioned. The powers of Congress are derived from several constitutional sources:

(1) The power "to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years" (art. 1, sec. 8, subd. 12);

(2) The power "to provide and maintain a navy" (art. 1, sec. 8, subd. 13);

(3) The power "to make rules for the government and regulation of the land and naval forces" (art. 1, sec. 8, subd. 14);

(4) The power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions" (art. 1, sec. 8, subd. 15);

(5) The power "to declare war" (art. 1, sec. 8, subd. 11);

(6) The power "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States" (art. 1, sec. 8, subd. 16);

(7) The power "to * * * provide for the common defense and general welfare of the United States" (art. 1, sec. 8, subd. 1);

(8) The vesting in Congress of "all legislative powers" (art. 1, sec. 1);

(9) The power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (art. 1, sec. 8, subd. 18).

The authority of the President in relation to the transportation systems is such as is conferred upon him by and from any one or more of the following sources:

(1) The provision vesting "the executive power" in the President (art. 2, sec. 1, subd. 1);

(2) The provision that "he shall take care that the laws be faithfully executed" (art. 2, sec. 3);

(3) The provision that "the President shall be commander-in-chief of the army and navy of the United States, and the militia of the several States" (art. 2, sec. 2, subd. 1);

(4) The provisions of the acts of August 29, 1916, and March 21, 1918, respectively.

That officers of the United States, even to the President, in the discharge of their duties, are amenable to the laws for their conduct, is made very clear in one of the earliest cases which came before this court. The decision of the court in *Marbury vs. Madison*, 1 Cranch, 137; 2 L. Ed., 60, has since been followed in every case involving the same question. The court said (p. 165):

> "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested right of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

And (page 169):

"With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites

some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

"But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but on particular acts of Congress, and the general principles of law?

"If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?"

Neither can it be claimed that the existence of a state of war enlarges the power of Congress or of the President, or in any way impairs the force or effect of constitutional or statutory provisions defining or controlling the scope of such power. The character of the war powers of Congress and of the President were long ago expressed in the following language (*Ex parte* Milligan, 4 Wal., 2-120 18 Law Ed., 281):

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

And further (p. 124):

> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, de-

stroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish.

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the judiciary disturb, except the one concerning the writ of habeas corpus."

## (4) THE RIGHT TO MAINTAIN THE SUIT AGAINST THE NORTHERN PACIFIC RAILWAY COMPANY

The defendant Northern Pacific Railway Company contends that because it no longer has possession and control of its property, the suit as to it should be dismissed. Section

10 of the Federal Control Act of March 21, 1918, contains the following provisions:

> "*Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law* (Italics ours); and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

It is our contention that under this provision the Northern Pacific Railway Company is the necessary and proper party defendant in this suit; in other words, that within the purview of this section the Northern Pacific Railway Company is the "carrier."

It is apparent that Congress intended to preserve the right to sue. The defendant railway company, however, asserts that since its operating property has passed under Federal control the right to maintain suits against the corporation in cases involving the operation of its transportation system no longer exists.

If the provisions of the section are to be accorded any force whatever, this contention would leave but one alternative, namely, that suits involving the conduct of railroads under Federal control must be brought against the President, the Director General, or some subordinate Federal agent.

This brings us to the question of the intention of Congress by the use of the language above quoted.

We believe that it is manifest from that language (without reference to other parts of the act) that the word "carrier" as used in this section refers to the railroad corporation. It will be noted that under the second sentence of the provision "such carrier" (*i. e.,* the "carrier" who may be sued at law or in equity) may not have "any action *heretofore or hereafter* instituted" transferred to a Federal court. Obviously, suits instituted prior to Federal control would be instituted either by or against the railway corporation, and in making provision with respect to such suits the railway corporation alone could be referred to as the "carrier." Here we find the word "carrier" used with respect to suits instituted subsequent to Federal control. Clearly the word cannot have a different meaning in respect to the latter class of actions than must necessarily be given to it with respect to the former. And since the expression "such carrier," used in the second sentence, refers to the word "carrier" as used in the first sentence, it follows that the word refers to the railroad corporation throughout the provision relating to the bringing of actions.

The effect of this provision is to create the railroad corporation the agency of the railroad administration for the purpose of bringing and defending law suits concerning the operating properties of that particular corporation. Nor can such a provision create any difficulty in the matter of the Federal control of railroads. The director general may promulgate such rules and regulations as in his judgment will be conducive to the proper conduct of any litigation involving the exercise of his functions.

That this is the proper interpretation of the word "carrier" is the more apparent when reference is made to the other provisions of the Federal Control Act. It is a primary rule of statutory construction that a word used in the legislative act is to be deemed to have the same meaning wherever used in the act, unless a different meaning is manifestly intended by the legislature.

When we turn to the other provisions of the Federal Control Act it is very clear that when the word "carrier" is used the particular railroad corporation under Federal control is meant.

Section 1 treats of agreements with "any such carrier making operating returns to the Interstate Commerce Commission," *i. e.*, railroads and systems of transportation under Federal control. Since the director general acts for the President in making such agreements, it is clear that the railroad corporation is the carrier within the meaning of this section. Moreover, no agency other than the railroad corporation makes operating returns to the Interstate Commerce Commission.

Section 2 provides for payment of compensation to "any carrier while under Federal control," in the absence of agreement. Here also, obviously, the railroad corporation is referred to.

Likewise, in section 3 referees are to be appointed "on the application of the President or of any carrier," to act in the matter of fixing compensation.

Section 4 speaks of "the cost of road extensions to the property of *such carrier* made by such carrier with the approval of or by order of the President while such property is under Federal control." Again we not only find the word "carrier" used in the sense of owning the transportation system, but we also find it regarded as having authority to make additions and betterments, even during the period of Federal control, with approval of the President or in pursuance of his order.

By section 5 the "carrier" may pay dividends in certain cases without the approval of the President. Here also the reference is to the railroad corporation, not to the director general.

Section 6 refers to the "operating income of said carriers," and to the use of the same in paying the expenses of Federal control, just compensation, providing for terminals, equipment, and other purposes, as may be directed.

This section also contemplates the making of additions, betterments and extensions "necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier." So, again, the word "carrier" is used in respect to such additions and betterments, and it is provided that the revolving fund created by the section may be advanced "to *such carrier* * * * to pay for additions, betterments, and equipment so ordered (by the President) and constructed by *such carrier* or by the President * * * ."

Again, reference is made to losses "claimed by any carrier" by reason of any such additions, betterments, or extensions ordered by the President.

The obligations which the "carriers" are authorized to issue during the period of Federal control can only mean the obligations of the railroad corporations (sec. 7).

By section 9 the act is made applicable "to any carriers to which Federal control may be hereafter extended." Thus, the word "carriers" is used in the sense of railroad corporations not yet under Federal control.

Similarly, in section 11 "every * * * corporation, whether *carrier* or shipper * * * is punishable for a violation of the act."

Section 12 refers to "moneys and other property derived from the operation *of the carriers* during Federal control."

The word "carriers" is found in other provisions of the act, always used in the same sense; but we believe we have referred sufficiently to specific provisions clearly indicating that the term is used in each instance as synonymous with "railway corporations," or of the corporate entity as distinguished from the Railroad Administration.

It therefore follows that under the provisions of section 10, giving the right to maintain actions at law or suits in equity against "such carriers," suits may be maintained against the railroad corporations.

Under the act of Congress the corporation is made an agent

of the Government. The Government is not the proprietor of the railroad system. It is merely exercising a certain control over the system for the emergency. The extent of that control and the agencies through which it shall be exercised are questions for the determination of Congress, and we submit that its intent with respect to suits is unmistakable.

Since the "taking over" of the railroads by the Federal Government both the railroads and the railroad administration have insisted that the right to sue the railroad corporations no longer existed, at least so far as causes of action arising from the operation of the transportation systems are concerned. Indeed, in his proclamation of December 26, 1917, the President attempted to vest in the director general the power to control litigation. That proclamation recites that "suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as the director general may, by general or special orders, otherwise determine."

So far as we have been able to find, the case of *Muir vs. L. & N. R. Co.*, 247 Fed., 888, is the only reported case in which the nature of the Federal control of railroads prior to the passage of the Federal Control Act is discussed. The action was one for personal injuries arising out of an accident occurring before the taking over of the railroads, but begun subsequent to the date of Federal control. The court considered the nature of Federal control during the period following the President's first proclamation and prior to the adoption of the Federal Control Act of March 21, 1918. Discussing the act of August 29, 1916, and the initial proclamation of the President, Evans, District Judge, said (p. 894):

> "The statute authorized the President (*a*) in time of war, (*b*) through the Secretary of War, (*c*) to take, possess, and assume control, (*d*) of any system of transportation, to the exclusion, if necessary, of any other transportation thereon, (*e*) for the

transfer or transportation of troops, war material, and equipment, and for such other purposes connected, (*f*) with the emergency as may be needful or desirable. Under no established rule of interpretation can it be doubted that it was the intention of the legislative body to authorize, in time of war, the War Department and no other to take over the railroads for war purposes, such as transportation of troops and war material, and for such other purposes as might be desirable in the emergencies of war. Besides being an appropriate function of the War Department, it was the plain meaning of the statute which Congress enacted that the War Department should have authority over it, and even if we assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated, we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; Congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of the question whether the rule stated by the Supreme Court in *Smith vs. Black,* 115 U. S. at page 319, 6 Supreme Court, 56; 29 L. Ed., 398, to the effect that, 'where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person,' would not apply."

It was insisted by the defendant railway company that a suit would not lie in the State court because the railroad was in the possession and under the control of the director general and hence the cause was one arising under the laws and Constitution of the United States. In disposing of this contention, the court said (p. 895):

"Certainly the proposition is so well established as to be elementary that Congress may authorize heads of departments or other officers to make regulations within certain limits, and, when made within those limits, such regulations have the force and effect of law, and may be enforced as such; but it has often been held that the delegation of authority to make

> regulatory orders gives no power to add to, take from, or modify the limitations prescribed by Congress. * * *
>
> "On its face the act of August 29, 1916, does not give authority to the President to make or promulgate a proclamation of any character. No one, however, could or would contend that he had not abundant authority to issue such documents whenever he thought it proper to give notice or information to the public. But such papers cannot have any effect as laws, in the absence of express constitutional or congressional authorization. * * *
>
> "The proclamation designated Mr. McAdoo as Director General of Railroads. This position being unknown to the law, its powers are not fixed; but we suppose it was the intention to make him, not only a member, but the head, of the board of directors of each railroad company * * *."

After quoting the language of the proclamation relating to suits, the court says (p. 896):

> "We find no statutory warrant for this provision in the proclamation, and especially none for the exception mentioned in the last clause of it. We may, however, ignore that exception, because nothing appears to show any attempt to carry it into effect; but, even if we suppose that the other limited interruption of the rights of litigants while the war goes on should be patriotically accepted by all good citizens, litigant and otherwise, it by no means follows that the law authorizes any interference with the course of judicial procedure between litigants before the time arrives when there might be attempts to seize, under execution issued upon final judgments, property in the temporary possession of the United States under the proclamation."

The motion to remand the case to the State court was granted. Thus the court squarely held that during that period of Federal operation prior to the adoption of the Federal Control Act the railroad companies were subject to suits at law.

The Federal Control Act was adopted March 21, 1918, subsequent to the decision in *Muir vs. L. & N. R. Co., supra.* Undoubtedly, Congress, in making the provision for the maintenance of suits against the carriers contained in section 10 of the Federal Control Act, had in mind the attitude of the Railroad Administration with respect to litigation arising during the period of Federal control and the decision of the court in the *Muir* case was within the legislative cognizance.

That Congress did have this knowledge is shown by the provision in section 10 for the retransfer of suits removed to the Federal court during the period of Federal operation prior to the act of March 21, 1918. With this knowledge Congress provided for suits against the carriers. We submit that the Northern Pacific Railway Company is a proper party defendant.

## (5) THE FEDERAL CONTROL ACT DID NOT ABROGATE THE LAWS OF THE STATE RESPECTING THE ESTABLISHMENT AND REGULATION OF RATES.

The Board of Railroad Commissioners of North Dakota was created by section 82 of Article 3 of the Constitution of the State (section 579, Comp. L. of North Dakota, 1913).

By section 4724 (*Id.*) every railroad is required to print and keep for public inspection, schedules showing the rates and fares for the transportation of persons and property which such railroad has established.

In section 4725 (*Id.*) it is provided:

> "No advance shall be made in the rates, fares, and charges, which have been established and published as aforesaid by any railroad * * * except after ten days' notice in writing to the commissioners of railroads which shall plainly state the changes proposed to be made in the schedules then in force and the time when the increased rates, fares, or charges will go into effect * * *."

Chapter 199 of the laws of North Dakota of 1907 (Laws 1907, p. 327, Comp. L. North Dakota, section 4796) established maximum passenger rates.

The constitutional provisions and the statutes above referred to are printed in full in Appendix No. 2.

The question is whether or not these and other similar provisions of the laws of the State will be abrogated or suspended during the period of Federal control by the act of August 29, 1916, or the act of March 21, 1918, or whether they may be abrogated or suspended by the President or his agencies.

### (*a*) State powers as to railroads built for war purposes.

In the light of the decisions on Federal control of private property for war purposes, is the continued exercise of the power of the State or the continued application of its laws over intrastate rates, other than for the transportation of "troops, war material, and Government supplies" so inconsistent with the provisions of the emergency act to secure such control and meet conditions growing out of the war that the State is to be deemed divested of its power and authority, and State laws controlling and regulating intrastate matters rendered subject to the orders of the Railroad Administration?

The extent to which the exercise of State powers for State purposes is subordinate to national powers has been clearly indicated by a number of decisions of this court. These cases generally involve railroads built under acts of Congress and aided by Government lands and bonds for the purpose of securing the use and benefit of such railroads for postal and military purposes. Nearly all of the cases to be examined in this connection have to do with railroad corporations organized under the Act of Congress of July 1, 1862.

Before entering upon a discussion of these cases, attention should be given to the early decisions fixing the boundary of Federal and State powers.

In *McCullough vs. Maryland*, 4 Wheaton, 316, Chief Justice Marshall laid down the rule that the States were forbidden by the Federal constitution from taxing agents or instrumentalities of the Federal Government, but that they might tax the property of such agents or instrumentalities, clear distinction being made between the acts and the property of such agents and instrumentalities. The case involved a branch of the United States Bank and the attempt of the State of Maryland to tax its notes. The tax was intended to drive the branch bank out of Maryland and the tax upon the different denominations of notes was excessive.

The same rule was laid down in *Osborne vs. Bank*, 9 Wheaton, 738, where the State of Ohio attempted to drive out a branch of the United States Bank by levying a tax upon its right to do business in the State. This tax was so exorbitant as to amount to an inhibition upon the transaction of business by the bank within the State. In these two decisions Chief Justice Marshall laid down the rule that the agents and instrumentalities of the Federal Government should not be impeded or hampered in their activities by the interference of State authority.

The first decision directly in point, but controlled by these two decisions, was that of *Thompson vs. U. P. R. Co.*, 9 Wallace, 578; 76 U. S., 792, where an attempt was made by the State of Kansas to tax the property of the Union Pacific Railroad Company which had been constructed by a corporation organized under the authority of Congress. The provisions of the charter were not unlike the provisions in the charter of the United States Bank which was construed to be an instrument of the Federal Government in *McCullough vs. Maryland* and *Osborne vs. Bank, supra*. The Government was not a stockholder in the railroad as in the bank, but it loaned its credit to it and made it large grants of land.

A right of way had also been granted and the right to secure material from adjacent lands was among the privileges conferred. The corporation was obligated to keep its lines of railroad and telegraph in repair and give precedence to Government matters, transportation of troops, or war materials and war munitions, etc. It was held that, although the corporation was an agent and instrumentality of the Federal Government, that it was subject to taxation by the State.

The leading case, however, in the construction of the Act of July 1, 1862, was that of *Union Pacific Ry. Co. vs. Peniston*, 85 U. S., 5; 21 Law Ed., 877, decided in 1873. This act was entitled, "An Act to Aid in the Construction of a Railway and Telegraph Line from the Missouri River to the Pacific Ocean and securing to the Government the use of the same for Postal, Military, and other purposes," and authorized certain persons, named in the act, together with five commissioners to be appointed by the Secretary of the Interior, and their associates and successors, as a body corporate, by the name of the Union Pacific Railroad Company, with perpetual succession, to lay out and construct, furnish, maintain and enjoy continuous railroad and telegraph service from the western boundary of the State of Iowa to the western boundary of the Nevada territory, with connections reaching to the Pacific coast. The act gave to the company a right of way through the public lands and the use of materials for completing the road to be found on adjacent lands. The road was completed and opened for service in 1869 and with the Central Pacific formed a continuous line from the Missouri river and the east to the Pacific coast.

The corporation was the creature of Congress. It received large aid from the general Government both in donations and loans; the President appointed five of its directors; annual reports were to be made to the Secretary of the Treasury; all the operations of the company in laying out, constructing and working its railroad and telegraph lines, as

well as its rates, were subject to the regulations imposed by its charter (whenever its net earnings exceeded ten per cent, the Government might regulate its rates); and upon failure to comply with the terms and conditions imposed by the charter or to keep the road in repair and use, Congress could assume the control and management and devote the income to the payment of its Government bonds. Money was loaned to the corporation by the United States to the extent of many millions of dollars and became a lien on all its property. And on failure to redeem its bonds, the Secretary of the Treasury was authorized to take possession of the road with all its rights, functions, immunities, and appurtenances for the use and benefit of the United States and, finally all the grants made to the company were declared to be upon condition that besides paying the Government bonds, the company should keep the railroad and telegraph lines in repair and use and should at all times transmit dispatches and transport mail, troops and munitions of war, supplies and public stores for the Government whenever required to do so by any department thereof, and that the Government should have the preference at rates not to exceed those charged to private parties and payable by being applied to the payment of bonds due the United States; and in addition to all this control by Congress and the obligations and liabilities of the company, Congress reserved the right to alter, amend, or repeal the charter.

The case arose upon a bill in equity to set aside a tax levied against the Union Pacific Company by the county of Lincoln in the State of Nebraska, the plaintiff corporation contending that the tax levied upon its property in Nebraska was in effect a tax levied upon the agents and instrumentalities of the Federal Government and in conflict with the rule laid down by Chief Justice Marshall in *McCullough vs. Maryland* and *Osborne vs. Bank*. Mr. Justice Strong rendered the prevailing opinion of the court, stating the purposes and provisions of this extraordinary charter to be "a

supervision and control of the road and telegraph line with the avowed purpose of securing to the Government the use and benefit thereof for postal and military purposes." Continuing, the court said:

> "Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the Government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The Government owns none of its stock, and though it may appoint five of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded. Admitting, then, fully, as we do, that the company is an agent of the general Government, designed to be employed, and actually employed, in the legitimate service of the Government, both military and postal, does it necessarily follow that its property is exempt from State taxation?"

The question here propounded is answered in part by the court:

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Mr. Justice Swayne, concurring in the prevailing opinion, found the intention evinced by Congress to be:

> "I see no reason to doubt that it was the intention of Congress not to give the exemption claimed. The

> exercise of the power may be waived. But I hold that the road is a national instrumentality of such a character that Congress may interpose and protect it from State taxation whenever that body shall deem it proper to do so."

The right of way of the Union Pacific Railroad Company was a gift from the Federal Government and it was contended by the railroad in *Union Pacific Ry. Co. vs. Burlington & Missouri River Ry. Co.*, 3 Fed., 106, that the right of way of the former railroad was the property of the Federal Government, set apart for its use and that it was exempt from the operation of the laws of the State of Nebraska respecting crossings, connection with other railroads and the condemnation of property for such purposes under the State law of eminent domain. The United States Circuit Court for the district of Nebraska said:

> "I am clearly of the opinion that the right of way of the Union Pacific Railway is not property of the Federal Government set apart for its own public use, so as to exempt it from the operation of the law of the State of Nebraska, above quoted, respecting the crossing and connecting of railroads, and the condemnation of property for those purposes. It is the property of the corporation acquired under a law of the United States. If, however, it were conceded to be the land of the United States, unless held for governmental purposes, it would, even in that case, be subject to the State's power of eminent domain. Land * * * not used for any of the purposes of the national government, may be taken by the State for public use. U. S. *vs.* Railroad Bridge Co., 6 McLean, 517.
>
> "It has been held by the Supreme Court of the United States that the Pacific Railroad is subject to state taxation. The Railroad Company *vs.* Peniston, 18 Wall., 5. It was insisted in that case that the Pacific Railroad was created by Congress for public

> and national purposes, and that, like a national bank, it was an instrument of the General Government, and not subject to State jurisdiction for purposes of taxation. But this position was not sustained. It is difficult to see upon what principle property can be held to be so exclusively within the Federal jurisdiction as to be beyond the reach of the State's power of eminent domain, and yet subject to State taxation."

Here we note a widening of the power to tax into that of regulation by State authority.

The act of July, 1862, provided that railroads then incorporated or thereafter to be incorporated should have the right to connect their road with the Union Pacific system, "at such places and upon such just and equitable terms as the President of the United States shall prescribe." It was contended by the railroad company in *Union Pacific Ry. Co. vs. Leavenworth N. & S. Ry. Co.*, 29 *Fed.*, 728, that this provision of the charter exempted the Union Pacific Railroad from the exercise of the power of eminent domain by the State of Kansas and from the laws of the State respecting the crossing and connecting of railroads and the condemnation of property for these purposes. The court held that the act of Congress providing that physical connection should be made by direction of the President did not prevent the State from compelling physical connection and exercising the power of eminent domain.

It would be difficult to see how the validity of State regulation of the Union Pacific Railway, a corporation organized by Congress—an instrumentality brought into being by the Federal Government for the primary purpose of securing to the Government the use and benefit of a road and telegraph line for military and postal use, could be brought to a clearer issue. The broad regulatory powers of the State were recognized and upheld and limited only when the enforcement of the regulations in any particular case deprived the railroad of the power to serve the Government, as the road

was intended to serve it—when the regulations hindered the efficient use of it for military and postal service. The regulations and the right to tax, were found not to have such a necessary effect, but left the railroad free to discharge the duties placed upon it by the Federal Government. Although it was said in the Peniston case that a tax upon the property of a railroad was not a direct obstruction to the exercise of Federal powers, and although the State regulations which were upheld, did in fact affect the operation of the railroad company, yet, they did not in such a way as to affect adversely its serviceability as a Federal agent; that State regulations affected the Federal use of the railroad was not enough, the effect must be an interference and an impediment.

The power to regulate and the power to tax are inherent in sovereignty—the power to tax being the more drastic of the two. Therefore, as the power to tax may be exercised in respect to the agency or instrumentality of the Federal Government, the power to regulate can likewise be exercised by the State. This was the rule laid down in *Reagan vs. Mercantile Trust Co.*, 154 U. S., 413; 38 Law Ed., 1030, decided in 1893. It is a companion case to Reagan *vs.* Farmers' Loan & Trust Co., decided at the same time, and involves the validity of the act of the legislature of Texas creating a Railroad Commission with power to regulate rates. In the Reagan case, the Texas & Pacific Railway, a corporation organized under the laws of the United States, insisted that it was not subject to the control of the State even as to rates of transportation wholly within the State. Mr. Justice Brewer, speaking for the court, said (pp. 414-15).

> "We are of the opinion that the contention of the Railway and Trust Companies cannot be sustained, and that the reasoning in the cases of Thomson *vs.* Union Pac. R. Co., 9 Wall., 579, and Union Pac. R. Co. *vs.* Peniston, 18 Wall., 5, 36, leads to this conclusion."

After quoting from the opinion of Mr. Justice Strong in the Peniston case, as above excerpted, he said (pp. 416-417):

> "Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from State control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of the opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and other police regulations."

In brief, that in the absence of an express exemption from State control, it must be assumed that Congress intended the

corporation to be subject to the ordinary control exercised by the State.

In Smyth *vs.* Ames, 169 U. S., 466; 42 Law Ed., 819, decided in 1897, the Union Pacific Ry. Co. contended that a statute of the State of Nebraska involving railroad rates was unconstitutional as direct interference with a Government agent and instrumentality. The court said (pp. 521-2):

> "Undoubtedly Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the States through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits.
>
> "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made

> of authority to add to, alter, amend, or repeal that act, prescribes the rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

We think it a fair inference from the decided cases, to assume that the rail control acts involve no question of conflict between State and Federal powers. The conduct of the war is a national duty carried out by the central government. When the State, in dealing with internal commerce, undertakes to regulate interstate agencies or instrumentalities, the States are not permitted directly to limit or restrain that, which, from its nature, should be governed in the manner that the national legislature constitutionally ordains.

The power of Congress to regulate commerce among the several States is plenary, and if a State enactment imposes a direct burden upon, and an actual interference with, interstate commerce or other national concerns, it falls, irrespective of Federal legislation. If the State regulation of its intrastate concerns does not burden, impede or interfere with, but merely affects the national concern, the State authority is unimpaired. Minnesota Rate cases, 230 U. S., 352, 398, 400 and 411.

As it is plainly indicated by the decisions above quoted, the fact that the railroads are instrumentalities of interstate commerce does not preclude the exercise by the State of powers establishing regulations governing their internal commerce, provided that they do not burden interstate commerce, and the fact that they are temporarily agents of the national government to execute national policies in war time, does not exempt them from State regulation. The national power exercised for the enactment of national measures in war time emergencies is paramount, but the question here is not merely one of the existence of inherent power either in the national government or in the States, but the purpose manifested by Congress to exert its powers to the exclusion

of that of the States. In matters growing out of the war emergency, for which Congress deemed it necessary to prescribe regulations, there can be no question that the national powers are paramount and exclusive—whether these matters involve interstate commerce or the employment of other agencies for the execution of constitutional functions; but in so far as these instrumentalities are employed only in the purely local concerns of the State, regulatory power is reserved to the State authority.

### (*b*) The Federal Control Act is not inconsistent with the laws of the State.

We have shown that the mere fact that a railroad may be an agency of the Federal Government for military or other purposes, does not necessarily exempt such railroad from State authority. Let us now examine the provisions of the Federal Control Act and the laws of the State to determine whether or not they are in conflict to the point of inconsistency or whether they may be reconciled; for, after all, this is the test to which this legislation must finally be submitted. The question of the extent to which the laws of the State have been superseded by the acts of Congress must be determined from the nature of the provisions of each and the extent to which they are in conflict.

This court has repeatedly announced the rule that the question of conflict is to be determined by the ordinary rules of statutory construction and that it should not be held that the State legislation has been superseded except in cases of manifest repugnancy.

In the case of *Reid vs. Colorado,* 187 U. S., 137-48, the court said:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly

> manifested. This court has said—and the principle has been often reaffirmed—that in the application of this principle of supremacy of an act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. *Sinnot vs. Davenport,* 22 How., 227, 243."

Again, in *Missouri, &c., Co., vs. Haber,* 169 U. S., 613-23:

> "May not these statutory provisions stand without obstructing or embarassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

It will hardly be contended that the act of August 29, 1916, operates to abrogate, repeal or suspend the provisions of law, Federal and State, relating to the publication and establishment of rates, except as such laws may be affected by the utilization of the railroads "to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

In any event, the question of the effect of Federal control must be determined from a consideration of the act of August 29, 1916, and the act of March 21, 1918, as a whole, and the intention of Congress ascertained from a consideration of all of the legislation upon the subject.

In *Saronville Mills vs. Russell,* 116 U. S., 13, the court in construing the acts of Congress relating to the revenue tariff system said (p. 21):

> "The whole system must be regarded in each alteration, and no disturbance allowed of existing legisla-

tive rules of general application beyond the clear intention of Congress."

Turning to section 10 of the act of March 21, 1918, we find the rule stated:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

Congress here expressly states its intent that the carriers shall be subject to the provisions of existing law except (1) where such laws are inconsistent with the provisions of this act or any other act applicable to Federal control, and (2) except where such laws are inconsistent with any order of the President. Thus we find the rule written into the statute itself.

Since the act of March 21, 1918, is the only act in which such inconsistency can be asserted to exist, let us examine the provisions of that act to ascertain whether there is contained therein provisions inconsistent with the laws of the State relating to the promulgation and establishment of intrastate rates.

In section 10 we find the following:

> "During the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination."

Is the power here vested in the President to "initiate" rates inconsistent with the laws of the State relating to the

filing and establishment of rates? Surely it is not. The used of the word "initiate" in defining the power of a public agency is new, but manifestly it is used in the sense of proposing a rate rather than in the sense of *fixing* or *establishing* the rate. The explanation of the use of this word is probably found in the fact that under the act of August 9, 1917 (Fed. Stat. Ann. Supp., 1918, p. 392: —— Stat. L. ——), the carriers were required to first obtain the approval of the Interstate Commerce Commission before filing any increased rate or charge, and to the desire to remove this restriction during the period of Federal control. Prior to this statute the carriers themselves, under Federal laws and under the laws in force in most of the States, have always had the power to *initiate* rates. This power, however, has never been regarded as inconsistent with the *fixing* and *establishment* of rates by regulative commissions nor with the obligation to comply with provisions of law respecting the filing and publication of the rates so initiated.

Nor is an inconsistency created by the provision for the filing of the rates initiated by the President with the Interstate Commerce Commission. Prior to Federal control rates initiated by the carriers were required to be filed with the State commissions and the Interstate Commerce Commission, and, as pointed out, since the initiation of the rate is not the fixing of that rate, there is no inconsistency in permitting a rate to be initiated by filing it with the Interstate Commerce Commission and the concurrent requirement of compliance with State laws upon the subject. We believe this is the more apparent when regard is had to the provision forbidding the Interstate Commerce Commission from suspending rates initiated by the President pending final determination. In this provision Congress recognized the existence in the commission of a power to suspend rates initiated by the President and evidently felt it necessary to deprive the commission of that power during the period of Federal control, showing that Congress did not regard the power to initiate rates by filing the same with the Interstate Commerce Com-

mission as inconsistent with the power of the commission to review, regulate, and fix the rates so initiated.

As to the rates initiated by the President, the act provides (Sec. 10):

> "Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition."

Having deprived the Interstate Commerce Commission of power to suspend rates initiated by the President and having regard to the changed conditions existing under Federal control, Congress again evidences its intention not to deprive the commission of the powers vested in it by law. This is the more evident from the provision following:

> "After full hearing the commission may make such findings and orders *as are authorized by the act to regulate commerce as amended* (Italics ours) and said findings and orders shall be enforced as provided in said act."

For a statement of the powers of the Interstate Commerce Commission under the Act to Regulate Commerce as amended, we refer the court to the language of Judge Hughes in the *Minnesota Rate Cases*, 230 U. S., 352-417:

> "When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. at L. 379, Chap.

104, U. S. Comp. Stat Supp., 1911, p. 1284), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation, in which the nature and extent of State legislation, including the commission plan, were fuly reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st Session). And it was the fact that beyond the bounds of State control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

"Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the 1st section of the Act to Regulate Commerce there was inserted the following proviso:

" 'Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country, from or to any State or territory as aforesaid.'

"When in the year 1906 (act of June 29, 1906, ch. 3591; 34 Stat. at L., 584, U. S. Comp, Stat. Supp., 1911, p. 1288), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section 1 was re-enacted. Again, in 1910, when the act was extended to embrace telegraph, telephone, and cable companies engaged in interstate business, the proviso was once more re-enacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. (Act of June 18, 1910, Chap. 309, 36 Stat. at L., 545; U. S. Comp Stat. Supp., 1911, p. 1285.) The proviso in its present form reads:

" 'Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country, from or to

any State or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State, and not transmitted to or from a foreign country, from or to any State or territory, as aforesaid.'

"*There was thus excluded from the provisions of the act that transportation which was 'wholly within one State,' with the specified qualification where its subject was going to or coming from a foreign country.*"

The provisions of section 10 of the Federal Control Act modify to some extent the powers of the Interstate Commerce Commission in respect to the rules established for its guidance in the determination of questions affecting rates. It must proceed with due consideration to the fact that the railroads are being operated "under a unified and co-ordinated national control and not in competition."

The absence of an express provision in section 10 saving in power of the States to act through the State commissions in cases involving intrastate rates is explained by the provision of section 15 saving the "police power" of the States. Having preserved to the States their right to make police regulations (with certain exceptions), it was wholly unnecessary to expressly save the jurisdiction of the State authorities as was done in the case of the Interstate Commerce Commission.

Another requirement is made by a proviso embodied in section 10, to the effect "That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the

President, together with such recommendations as he may make."

This provision would support a theory that Congress had in mind the idea of the use of the railroads as a vehicle of taxation for the support of the war, and that regarded as such an instrument, the power of the President in the initiation of rates was unlimited. In view, however, of the provision of the section making "justness and reasonableness" the basis of the commission's action, we do not believe the taxation theory can be maintained.

Certainly those provisions of the Federal Control Act with relation to the exercise by the Interstate Commerce Commission of the powers *now possessed* by that body, although modified by the existence of Federal control, cannot be held to be inconsistent to the point of conflict with the existence of State laws regulating the publication and fixing of "reasonable rates for its exclusively internal traffic." (*Minnesota Rate Cases, supra*).

The provisions of the Federal Control Act, in so far as they affect the Interstate Commerce Commission, are purely restrictions or limitations upon the power of that tribunal. These provisions evidence no intent upon the part of Congress to broaden the powers of the commission or to extend its authority over intrastate rates.

It may be contended that by reason of the provision of the act for the taking over of all the revenues of the carriers under Federal control Congress intended to assume authority to fix all rates, interstate and intrastate.

It should be remembered that under the decisions of the Supreme Court of the United States a carrier is entitled to receive reasonable rates and that this right cannot be denied by a State, either through a commission or otherwise.

> "The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."
>
> *Smyth vs. Ames,* 169 U. S., 466-546.

And as said in the case of *C. M. & St. P. Co. vs. Minnesota*, 134 U. S. 418-548, this is a question for the courts:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United Sates; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

As said by the Supreme Court of South Dakota in the case of *State ex rel. Attorney General vs. Dakota Central Telephone Company*, decided March 24, 1919:

> "Intrastate rates, as well as interstate rates, established under authority of the law, are entitled to the benefit of a presumption that they are fair and reasonable. How can it be said to be inconsistent with the assumption of the revenues for Congress to declare that such assumption was subject to the reaonable rates lawfully established."

It will undoubtedly be argued that the Government, as the temporary proprietor of the property, has the right to *initiate and establish* rates. No one disputes the power of the Government to initiate rates. Indeed, the law specifically provides the method of procedure with respect to interstate rates. The question is as to the power in the matter of purely intrastate rates. The Government claims that the war emergency justified the exercise of the supreme power

of the Federal Government. Assume that it did. This is no reason why the law should not have said so.

It was argued by counsel for the railroad administration in the State court that it would be "absurd and contrary to the general welfare" to permit the Government to establish interstate rates for general commodities between points in different States and deny the right to fix the rates on the same commodities between points wholly within a State. Many will agree that the accident of State lines should have no controlling effect, but this condition is no more absurd in time of war than in time of peace, and it is just the condition that obtains in time of peace under the respective jurisdictions of the Interstate Commerce Commission and the authorized State commissions.

(c) THE POLICE REGULATIONS OF THE SEVERAL STATES.

The intent of Congress not to interfere with the right of the States to establish reasonable intrastate rates is further evidenced by section 15 of the act, which is as follows:

> "Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks or bonds."

As early as the case of *Chicago & N. W. R. vs. Fuller*, 17 Wall., 560, it was held that railroad regulatory legislation was an exercise of the police power. In that case this court had before it an act of the legislature of Iowa, requiring railroad companies to fix their rates for the transportation of freight and passengers and publish those rates and cause a printed copy of them to be posted in all stations and depots, the copy to remain posted during the year. The court said:

> "It is not, in the sense of the Constitution, in anywise a regulation of commerce. *It is a police regula-*

*tion*, and as such forms a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves."

In the case of *Munn vs. Illinois*, 94 U. S., 113, it was likewise held that a rate-regulatory statute was an exercise of the police power. This decision has since been adhered to.

The latest expression of the court is found in *Union Dry Goods Co. vs. Georgia Public Service Corporation*, decided March 24, 1919, as follows:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of the city is devoted to a use in which the public has an interest which *justifies rate regulation by a State in the exercise of its police power.* (Italics ours.) *Munn vs. Illinois*, 94 U. S., 113; *Budd vs. New York*, 143 U. S., 517; *German Alliance Insurance Co. vs. Lewis, superintendent of the State of Kansas*, 233 U. S., 289, 407."

Similar expressions are found in many of the decisions of State courts. To illustrate:

> "That act (public service act) is an elaborate law bottomed on the police power."
>
> *State vs. Kansas City Gas Co.* (Mo.), 116 S. W., 854.

> "First, it is made clear by these cases that the ascertaining and establishing reasonable rates for public service is one falling within the police power of the State."
>
> *State ex rel. Sedalia vs. Public Service Commission*, 204 S. W., 497.

> "It (reciprocal demurrage law) was passed under the police power of the State, and in the exercise of

> the sovereign power of the State to regulate public utilities."
>
> *Grand Rapids, etc., Ry. vs. Cobbs,* 168 N. W., 966.

> "The business of the companies (public moving vans) being a class of business subject to police regulation, a clear abuse of such power must be shown in order to warrant the courts in setting aside and declaring void the legislative act."
>
> *Lawson vs. Connelly,* 141 N. W., 623.

> "The power to regulate and control the rates of common carriers has been held to be a legitimate exercise of the police power of the State."
>
> *State vs. Superior Court,* 67 Wash., 37.

It would seem unnecessary, however, to examine the multitudinous definitions of the expressions "police powers" or "police regulations." We think the intent of Congress is apparent from the language of the proviso itself. The fact that Congress deemed it necessary to except police regulations affecting "the issue of stocks and bonds" shows that Congress deemed such laws to be police regulations. This is not consistent with the use of the term in its narrower sense. Evidently Congress had in mind the so-called Blue Sky Laws in force in various States, and felt it necessary that the carriers and the Government should be exempt from such laws during the emergency. Such a law was before this court in *U. P. R. Co. vs. Public Service Com.,* U. S. Adv. Ops. 1918-19, p. 55. Laws of this character, however, are not included within the narrower definitions of police powers or police regulations.

It is true that in its narrower sense police power is sometimes regarded as including measures for the protection of the public morals, and that one of the purposes of Blue Sky legislation is to prevent fraud. The paramount purpose of such laws, however, is to insure business prosperity and promote the economic welfare of the State.

The construction of a similar proviso was before the Supreme Court of South Dakota in the case of *State vs. Dakota Central Telephone Co.*, decided March 24, 1919, involving Federal control of telephone systems. The court discussed the effect of the proviso, saying:

> "It cannot be doubted that the power of a State to regulate the issuance of stocks and bonds by corporations created under its authority is a power entirely foreign to and outside of those powers included in the term 'police power' when such term is used in its narrow sense as referring to the power to preserve public safety, health and morals. Therefore, when Congress declared that the 'police regulations of the several States' left to the States, should not 'affect the issue of stocks and bonds' of telegraph and telephone companies, it is clear that it had in mind reserving to the States 'police regulations' which, if unrestricted, might affect the issue of stocks and bonds. Thus Congress has, by the very wording of this proviso, declared that it reserved to the States, subject to two limitations, the full police powers that the States possess as sovereign States. The term 'lawful police regulations' is therefore self-interpreted by Congress and needs no interpretation by the courts."

This language is directly applicable to the fifteenth section of the Federal Control Act and completely answers the contention that Congress used the term "police regulations" in its narrower sense, as not including rate-control regulations.

(*d*) STATE REGULATION OF LOCAL RATES DOES NOT "AFFECT THE TRANSPORTATION OF TROOPS, WAR MATERIALS (OR) GOVERNMENT SUPPLIES."

We have shown that the Federal Control Act is not inconsistent with, and therefore does not supersede, the police regulations of the States. We have shown that State regulatory laws are police regulations.

The question then arises: Do State regulations affecting only the transportation of property between private individuals and entirely within the limits of a State "affect the transportation of troops, war materials, or Government supplies?"

Section 10 provides "that carriers while under Federal control shall be subject to all laws and liabilities as common carriers * * * except in so far as they may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President." This exception is explicitly interpreted by section 15.

The word "affect" has a very elastic meaning in ordinary usage, but according to all legal interpretations of the word in statutory form it is held to mean to act injuriously upon or to affect adversely to a substantial degree. In the case of *Bryan vs. Carter,* 93 U. S., 78; 23 L. Ed., 807, the court had under consideration the meaning of the word "affect" as used in the proviso to an act of Congress confirming the title to certain real estate in the Territory of Missouri. The proviso was as follows:

> *"Provided,* That nothing herein contained shall be construed to *affect* the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in said territory."

In the opinion the court said:

> "It is unnecessary to give the various definitions of the word 'affect.' It is enough to say that it is often used in the sense of acting injuriously upon persons or things; and in this sense we are all of opinion it was used in this proviso. This interpretation accords with the reason and manifest intent of the proviso."

The matter of the charges for carrying passengers and freight between the various stations situated along the lines

of the Northern Pacific in the State of North Dakota has no direct effect upon the transportation of troops, war materials, or Government supplies. As stated before, it must be presumed that the established rates are reasonable. Such rates, governing as they do the transportation of property between individuals, have no more effect upon the conduct of the war than does any other purely local police regulation.

### (*e*) POWER OF THE PRESIDENT.

We have sought to show that the provisions of the Federal Control Act are not inconsistent with the laws of the State relating to the establishment of intrastate rates. It may be argued, however, that notwithstanding that no such inconsistency in the specific provisions of law exists, nevertheless, under the provisions of section 10 the carriers are subject to existing laws and liability only to the extent that such laws and liabilities are not inconsistent "with any order of the President," and that therefore the President may by order suspend the provisions of State regulatory laws. Certainly this position is not tenable when the nature of the power conferred upon the President is considered. The President is not given arbitrary power under the Federal Control Act.

By the act of August 29, 1916, the President was authorized to take possession and assume control of the carriers and utilize the same "to the exclusion as far as may be necessary of all other traffic thereon for the transfer or transportation of troops, war material, and equipment or for such other purposes connected with the emergency as may be needful or desirable."

The act of March 21, 1918, regards the taking over of the railroads as an accomplished fact under the prior act.

The President has not been vested with authority to set aside State laws, whenever he thinks it necessary to do so, for purposes connected with the war or for purposes connected only with the ordinary administration of railroad

affairs. The act subordinates State laws to such orders as the President is validly authorized to make by the act of March 21, 1918, and the act of August 29, 1916. Any order not so authorized would be of no effect. This is the interpretation stated on the floors of Congress by the member in charge of the bill (56 Cong. Rec., p. 3497):

> "MR. NORTON. * * * Does the gentleman have in mind any particular provision of a Federal law or any particular provision of any State law affecting railroads that could not be set aside by an order of the President under section 10 of this act? If the gentleman has any such State or Federal law in mind, will he state what it is?
>
> "MR. SIMS. I have all such laws in mind, and it is plainly provided that the carriers under Federal control shall be subject to all laws, whether Federal or State.
>
> "MR. NORTON. Will the gentleman answer my question as to what Federal law or what State law could not be set aside?
>
> "MR. SIMS. I am trying to answer the gentleman the best I can. I may not do it, but I am trying to do it. This reads: except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.
>
> "That means inconsistent with the provisions of this act or any order of the President made in pursuance of such acts or this act. *Now, I can not conceive that the President would ever for one moment suppose that he could make an order to overturn a law of a State that was not inconsistent, unless it was a law that would cripple and make it impossible to operate a railroad under Federal control.*"

In the case of Muir *vs.* Louisville & N. R. Co., 247 Fed., 888, in discussing the effect of the President's proclamation of December 26, 1917, the court said:

> "But such papers cannot have any effect as laws in the absence of express constitutional or congressional authorization."

Under the act of March 21, 1918, the President is authorized to make only such orders as are necessary or proper to carry out the objects of Federal control, *i. e.*, the use of the railroads for war and other purposes connected therewith.

No one would contend, for instance, that the President may make orders with respect to the method of recording documents affecting the title to the property of the carriers, the matter of establishing liens against their property, the liability of the carriers for damages in cases of personal injury or loss or destruction of property.

Clearly the State laws upon these subjects are not inconsistent with the act of Congress and cannot be abrogated or superseded by an order of the President. The laws governing the carriers in these matters have no relation to the conduct of the war. Similarly, if the obligation of the carriers to transport property at reasonable rates established by State law is not inconsistent with the provisions of the acts of Congress, it is not within the power of the President to interfere with the force and effect of these laws.

### (*f*) THE HISTORY OF THE ACT IN CONGRESS.

While the debates in Congress may not be resorted to for the purpose of ascertaining the intention of that body as expressed by the different members upon the floor, yet the congressional history of an act is often a most valuable source of ascertaining the legislative intent. As said by this court in Standard Oil Company *vs.* U. S., 221 U. S., 1 (page 50):

> "The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous

> development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the wide-spread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (United States *vs.* Trans-Missouri Freight Association, 166 U. S., 318, and the cases cited), that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

We believe that when the Federal Control Act is viewed in the light of the changes made in its text during the time it was under consideration by Congress, prior to its final passage, there can be but one opinion upon the question of the purpose of that body, that the States should retain their power to regulate rates applicable to their strictly domestic commerce.

The bill was introduced in the Senate (S. 3752) by Senator Smith of South Carolina, chairman of the committee of interstate commerce and was in charge of that gentleman on the floor of the Senate (56 Cong. Rec., p. 1685). In the House the bill was introduced (*Id.*, p. 1857) by Mr. Sims (H. R. 9685). The bill was an administration measure (*Id.*, p. 1944).

Unfortunately, the original bill is not set forth in full in the Congressional Record, so that its import must be gathered from statements upon the floor. It clearly appears, however, that as originally introduced, the bill vested final authority in the matter of establishing rates in the President (*Id.*, 2337):

> "Mr. SIMS. But when the public interest so requires the President may initiate rates, filing them with the Interstate Commerce Commission, to take effect upon such notice as he shall direct. Such rates

> are to be 'fair, reasonable and just.' But to guard against even remote possibilities of error the section provides that upon complaint the Interstate Commerce Commission shall make investigation, grant full hearings concerning the 'fairness, justness and reasonableness' of rates so ordered by the President, and 'make report of its findings and recommendations' to the President for such action as he shall deem required in the public interest."

Section 15 was not in the original bill and Section 10 was not in its present form. After consideration of the bill, the Senate Committee on Interstate Commerce presented a report accompanied by a bill prepared by the committee. (*Id.*, p. 1939).

Section 10 of the committee bill was as follows (*Id.*, p. 1940):

> "That carriers while under Federal control shall, in so far as is not inconsistent therewith, or with the provisions of this act, or any other act applicable to such Federal control, or with any order of the President, be subject to all laws and liabilities as common carriers, whether arising under statutes or at common law; and suits may be brought by and against such carriers and judgments rendered as now provided by law. But no process, mesne or final, shall be levied against any property under such Federal control.
>
> "That whenever in his opinion the public interest requires the President may initiate rates by filing the same with the Interstate Commerce Commission. Said rates shall be fair, reasonable, and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, or classification of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the rate. After full hearing the commission may make such findings and orders as are authorized by the Act to Regulate Commerce as amended."

A comparison of this section with the corresponding section of the act as finally adopted will show a number of changes, evidently made with the view of preserving the laws of the States.

It is not practicable, nor would it serve any useful purpose, to follow the act through the different steps leading to its final passage. Various amendments were proposed designed to effect one change or another; some of them to broaden the President's authority, others to more clearly preserve the power of the States. An attempt to set forth the substance of the debates would necessitate so much explanatory matter as to render the question more difficult of understanding than the records of the debates themselves. Moreover, the opinions of the individual members are of little importance in the determination of the question of law. For the convenience of the court, we include an index to the Congressional Record in Appendix III.

The bill first passed the Senate (*Id.*, p. 2519). However, as passed by that body, section 10 with the amendments mentioned was in almost the same form as when reported by the Committee on Interstate Commerce. The bill did not contain section 15 or any analogous provision. Section 13, however, saved State laws concerning taxation.

Contemporaneously with the Senate, the House had proceeded with the consideration of the House bill (H.R. 9685). As in the Senate, various amendments were offered.

Finally, the House took up the Senate bill, struck all the provisions following the enacting clause, substituted the provisions of the House bill, and passed it (*Id.*, p. 2835).

The Senate, failing to agree, a conference committee was appointed, and, the first report of this committee failing of adoption on a point of order, the bill was further considered in conference with the result that the report was agreed to and the bill passed both the House and the Senate. It was during these conferences that section 15 was inserted. In

its present form, that section was recommended by the final conference.

Thus, from a bill in which it was attempted to lodge final rate-making powers in the President, the bill became one in which the "police regulations" of the States and the jurisdiction of the Interstate Commerce Commission were preserved.

When a proposed act as introduced in the legislature establishes one rule (*i. e.*, broadly empowers the President to fix rates) and during its progress through that body is changed so that, giving the words used their ordinary definite meaning, the act means something else (*i. e.*, intrastate rates to be fixed by local authorities), that fact is of the greatest importance in determining the intention of the legislature. The act should be examined in the light of the change; and we submit that when this is done, the conclusion is unavoidable that Congress intended, as it said, that nothing in the act should be construed "to repeal, impair, or affect * * * the lawful police regulations of the several States * * * "

Respectfully submitted,

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